Sec. 619(b) of the Revenue Act of 1932, in part, reads as follows:

"(b) If an article is—

"(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price; the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner."

Art. 15 of Regulations 46 provides:

"Where through the existence of special arrangements between a manufacturer and a purchaser (as in the case of intercompany transfers at cost or at a fictitious price), the price for which articles are sold by the manufacturer does not reflect a fair market price, the sale is regarded as one made 'otherwise than through an arm's-length transaction.' In such cases the tax shall be computed upon a fair market price which, under the Act, the Commissioner is empowered to determine.

"Congress apparently foresaw the probability of the creation of corporations having identical interests, one as the manufacturer and the other as the distributing agency, and sought to impose the tax on the full manufacturer's sales price where the manufacturing corporation sold to the distributing corporation at a nominal price. There are numerous other instances where similar mutual interests could operate to the disadvantage of the Government. Viewing the statute in this light, it must be presumed that Congress did not intend to have two or more affiliated corporations

recognized as a single entity for manufacturers' excise tax purposes. If it had so intended it seems reasonable to believe that some provision would have been made in the statute for such recognition. That no provision was made, coupled with the fact that transactions not at arm's-length are specifically provided for, leads to the conclusion that the intent was to impose a tax on all sales between such corporations.

"That Congress had full knowledge of the conditions existing with reference to affiliated corporate groups is further established by the fact that in the income tax law special provisions appear relating to such groups, under which they are authorized to file consolidated returns. The general laws recognize corporations as separate entities; and in the absence of special legislation, such as is incorporated in the income tax provisions of the Act relating to affiliated groups, each corporation, as a separate legal entity, must file a separate return for the purpose of the excise tax.

"The contention that the statute should be interpreted to mean the 'economic manufacturer,' rather than the legal entity, can not be supported either by the language of this particular statute or by the general law relating to corporations. In the absence of specific provisions to the contrary, wherever a statute has spoken of a corporation it has always been interpreted to mean a single legal entity."

Income Tax Bulletins, Vol. VII, Cumulative Bulletin XI-2, p. 513-4.

REPLY BRIEF

FILED
OCT 12 1940
CHARLES ELMORE CROPLEY
CLERK

NO. 386

In the Supreme Court of the United States

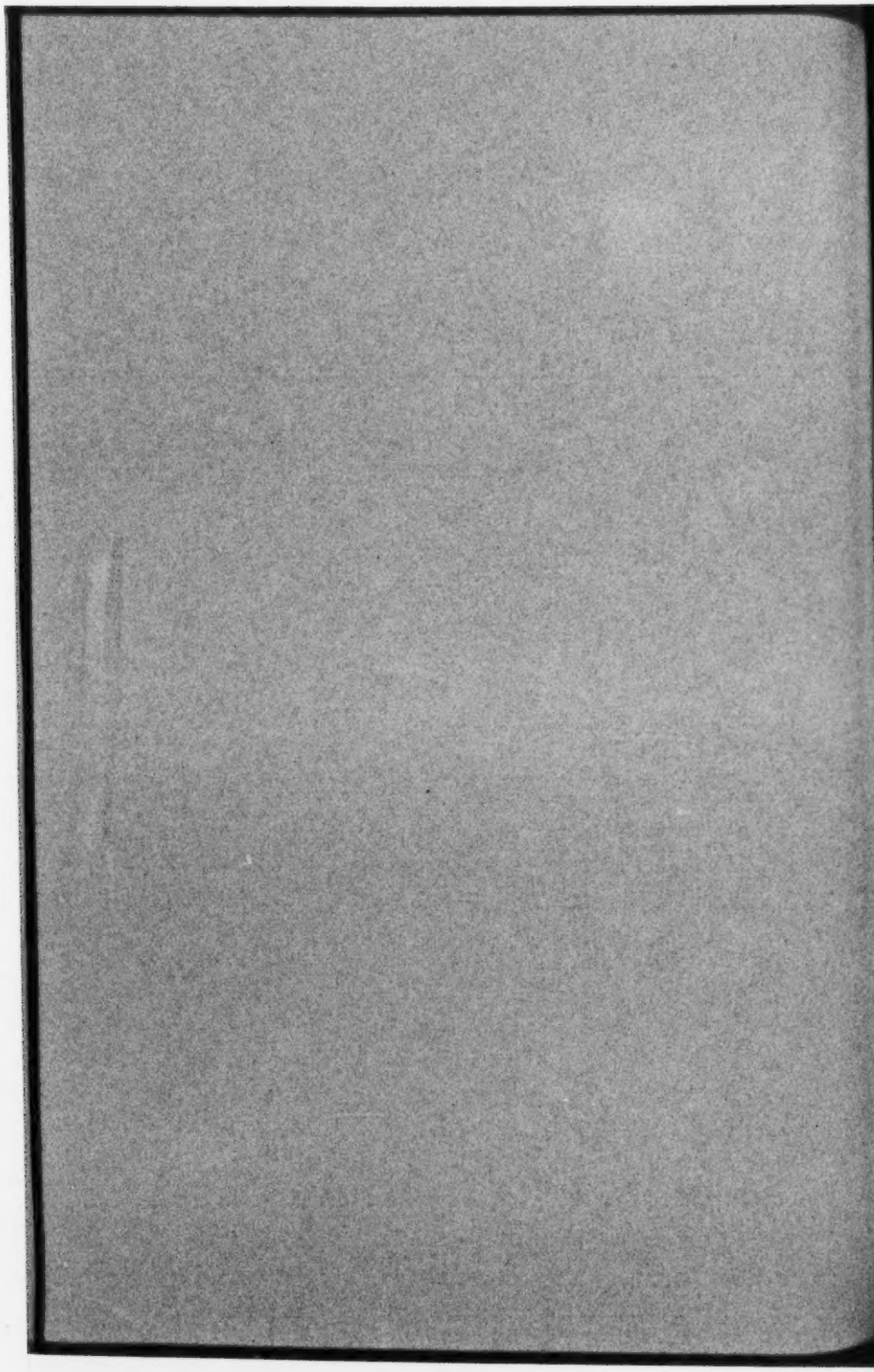
OCTOBER TERM, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,
VERSUS
H. C. JONES, Collector of Internal Revenue,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

CONTINENTAL OIL COMPANY,
By D. A. RICHARDSON,
A. L. HULL,
Its Attorneys.



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In respondent's statement certain facts are said to be disclosed by the findings of the district court. Among others:

> "The taxes in controversy were collected upon the subsequent sale by the subsidiaries just as though Continental had made the sales directly without the interposition of the subsidiaries." (Br. p. 3.)

Petitioner submits no such finding was made (R. 314-325). The undisputed proof is to the contrary (R. 185).

Again, respondent says:

> "There was no discussion concerning the prices to be paid for the inventories" (R. 318). (Br. p. 6.)

The wording of the finding made is "no argument," and not "discussion." The evidence is not controverted that the negotiations between the officials of the interested companies embraced discussions as to the "terms and conditions of the bills of sale," but there was no "argument as to what price the product should be sold for" (R. 79). The price is disclosed in the bills of sale (R. 411, 416), and there is no proof that such was not a fair price to both seller and purchaser.

Respondent says:

> "Notwithstanding the unusual character of the transaction * * *." (Br. p. 5).

The finding of fact was:

> "and so far as Conoco was concerned, they (the transfers) were distinctly unusual in the large amount of the transfer" (R. 319).

Petitioner concedes the amount purchased by Conoco on June 20, 1939, was in excess of its usual purchases. The same is true of purchases made during the same period by other jobbers (R. 419-429). Had Conoco not purchased as it did, its purchases after June 21, 1932, at the increased price would have left it in a weakened competitive position with other jobbers who had built up their floor stocks before the increase. (See statement of Judge PHILLIPS at R. 715).

In the argument respondent says the transaction was "admittedly for tax avoidance purposes." The position of petitioner was set out in its opening statement (R. 48). The sales to Conoco "served a proper and legitimate busi-

ness purpose" (R. 715). There is nothing "peculiar" about the facts. (Br. p. 7).

The major ground urged in the petition is in effect concurred in by respondent, to-wit, that the Circuit Court of Appeals has decided in a manner contrary to the Congressional intent and the settled practice of the Treasury Department a question of public importance on which this Court has not spoken. This question involves the proper construction and application of a federal statute. Respondent says:

> "The issue is merely whether the peculiar facts in this case call for the application of the same principles which governed in *Higgins* v. *Smith*, 308 U. S. 473, and *Griffiths* v. *Commissioner*, 308 U. S. 355." (Br. p. 7.)

and, in substance, that the application of an excise tax to a transaction between a parent and subsidiary corporation is to be determined by the presence or absence of a change in the flow of economic benefits. (Br. p. 8.) In support of its contention, respondent cites only the Higgins case.

There is no denial of petitioner's contention that the rationale of the decision of the Circuit Court of Appeals is contrary to the expressed intent of Congress under the excise taxing statute and the construction of these sections of the Act announced by the Bureau shortly after its passage. (Petitioner's Brief, p. 12). Petitioner submits that the liability for and the imposition of an excise tax has not heretofore been determined by the "flow of economic benefits." It is determined by the thing done, and not by the economic benefit resulting to either party from the

doing. There is no claim by respondent that the question presented by the petition has ever been passed on by this Court. In the absence of such claim the presumption must be indulged that respondent agrees it is an important question which this Court should determine.

The writ of certiorari should be granted.

Respectfully submitted,

CONTINENTAL OIL COMPANY,

By D. A. RICHARDSON,

A. L. HULL,

Its Attorneys.